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ABSTRACT

These papers are based on a 2002 seminar that examined the book "Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy" (James T. Patterson). "The Troubled Legacy of Brown v. Board" (James T. Patterson) highlights the impact of the case on the civil rights movement and school integration or desegregation and educational quality, asserting ambivalence about the role of Brown v. Board of Education. "The Importance of Brown v. Board" (Roger Wilkins) suggests that the case changed the expectations of black Americans in ways that ultimately had profound consequences for the nation. "Measuring the Impact of Brown v. Board" (Douglas S. Reed) maintains that the levels of racial oppression and racial conflict were altered by the decision, though it did not create a more equal educational system. "State Courts and Educational Finance" (Douglas S. Reed) discusses the trajectory from school desegregation lawsuits to school finance lawsuits, suggesting that school finance suits generally make a difference. "Electoral Politics and School Finance Reform" (Jeffrey Henig) examines the state electoral considerations that affect educational equity. "Educational Equity and the President's Initiative on Race" (Judith A. Winston) notes the presidency's limits in addressing the problem. An appendix presents significant state Supreme Court rulings that have struck down or upheld the existing school finance system. (SM)

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Brown v. Board of Education: Its Impact on Education, and What It Left Undone

Winter 2002

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Introduction

Philippa Strum

In the last decade, a number of scholars have challenged the belief that the Supreme Court's school desegregation decision in *Brown v. Board of Education*[1] made any difference to racial equality in the United States. The leading work, Gerald Rosenberg's *The Hollow Hope: Can Courts Bring About Social Change?*[2] argues that the major social changes of the late twentieth century in the areas of civil rights, women's rights, and abortion occurred in spite of or without regard to Supreme Court action and that, more generally, courts can almost never be effective producers of social reform. There is a particular moment in history when things are going to happen anyway, Rosenberg states, no matter how courts behave. Because the Court's decisions are not self-implementing, he adds, its rulings in areas of social change are irrelevant. Unless the other branches of government are interested in moving in the same direction, no change takes place. And if those branches want change, they will achieve it without reference to the courts.

Rosenberg's thesis has been picked up by a great many people in the legal profession and the social sciences. Judge Richard Posner, for example, a legal theorist and scholar as well as a member of the Seventh Circuit Court of Appeals, wrote in a blurb for the cover of *The Hollow Hope*, "Rosenberg's book sets a new standard for studies of judicial impact and will cause many lawyers to revise their view of the relation between law and society."

Rethinking has indeed occurred as scholars discuss exactly what led to integration (or, perhaps, desegregation, which is of course not the same thing). Was it the Court, or other governmental institutions, or the correct societal moment that ended segregation laws, or was it some combination of those? How much of an impact did the Supreme Court's decisions have?

More fundamentally, one may ask what the real purpose is of having integrated or desegregated schools. What is the aim, and how does one

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assess success? If the goal is to get black and white children sitting side-by-side in schools, the measurement of success or failure is as relatively simple as establishing what is meant by "black" and "white," and then counting heads. That kind of integration would seem to have been the motivation for the Court's decision in *Brown*. If the goal is to improve the quality of education, however, a different measurement becomes necessary.

Any assessment of the impact of *Brown v. Board*, then, must revolve around a number of questions: what were both the goal of and societal expectations for *Brown v. Board*? Was either achieved, or were both, and by what measurement?

Those questions are addressed in *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*, written by former Woodrow Wilson Center Fellow James T. Patterson.[3] The Division of U.S. Studies convened a seminar on January 9, 2002 to discuss the book and its conclusions. The edited proceedings comprise the first three essays in this collection.

Professor Patterson argued that *Brown*'s impact on public opinion, racial protest, and national politics was minimal at best. Roger Wilkins, a civil rights activist as well as a professor of history, replied that it changed the expectation of black Americans in ways that ultimately had profound consequences for the nation. Douglas Reed, a political scientist, maintained that the levels of both racial oppression and racial conflict were altered by the decision.

While the panelists disagreed about whether *Brown v. Board of Education* really mattered, then, they all acknowledged that the public school system today is neither racially integrated nor equitably funded. If those were the goals of *Brown v. Board*, then the decision was a failure. The reasons are numerous. One is the flight of wealthier and politically adept whites out of urban areas and their school systems. But whatever the causes of educational inequities and continued *de facto* segregation may be, Roger Wilkins, one of the panelists, commented that it is time for the country's focus to change. Integration may remain the ideal, but it is so far from achievement that the country's current goal should be to make public schools in black neighborhoods as good as possible.

Perhaps the greatest problem in achieving that goal is the national policy of funding public schools through property taxes. As African American neighborhoods are disproportionately poor, with lower property tax bases, less money is available for schools in those areas. The question of how good public schools in African-American neighborhoods can be looms large.

That is the problem addressed in Douglas Reed's *On Equal Terms: The Constitutional Politics of Educational Opportunity*,[4] the focus of a follow-up

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conference held on March 11, 2002. Recognizing that funding rather than race may be the key to quality education, Reed acknowledges the devastating effects on educational equity of two other Supreme Court decisions.

In one of the cases, *San Antonio v. Rodriguez*, the Supreme Court held that there is no federal constitutional right to an education.[5] There is, therefore, no federal constitutional right to an equally funded education. In the second and perhaps more devastating case, *Milliken v. Bradley*, the Court struck down a plan that would have consolidated the Detroit school district with surrounding suburbs.[6] Lower federal courts had found that if the Detroit area was treated as a separate entity, it would always be segregated, and that prospect warranted consolidation. The Supreme Court, however, held that because there was no showing that the white suburban school districts had ever engaged in legal segregation, it was impermissible to order their inclusion in a solution to what the Court viewed as Detroit's dilemma.

Faced with these obstacles to invoking the U.S. constitution, some advocates of equity turned to litigation based on state constitutions. The litigation's successes and failures are detailed in Professor Reed's book, and in the fourth essay here, he analyzes his findings. In the fifth essay, Professor Jeffrey Henig examines the state electoral considerations that affect educational equity; in the sixth, Professor Judith Winston, former director of President Clinton's Initiative on Race, suggests the limits of the ability of the presidency to address the problem.

NOTES

1. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Brown v. Board of Education* (commonly referred to, and cited below, as *Brown II*), 349 U.S. 294 (1955). While the decisions technically involved only segregated schools, they are generally acknowledged to have constituted the first step in the eventual end to all formally segregated publicly funded institutions.
2. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago, 1991).
3. *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (Oxford University Press, 2001).
4. Douglas S. Reed, *On Equal Terms: The Constitutional Politics of Educational Opportunity* (Princeton University Press, 2001).
5. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).
6. *Milliken v. Bradley*, 418 U.S. 717 (1974).

The Troubled Legacy of *Brown v. Board*

James T. Patterson

Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy[1] is an attempt to look back at the *Brown* case of 1954 and, as the subtitle indicates, decide whether it can rightly be regarded as a civil rights milestone or whether, to some considerable degree, we should be concerned with its troubled or perhaps troubling legacy.

When the unanimous decision was announced on May 17, 1954 by the Warren Court, it generated a good deal of excitement. The *Amsterdam News* of Harlem said that this was the greatest victory for the Negro people since the Emancipation Proclamation. Thurgood Marshall, the chief lawyer litigating the five cases that actually made up *Brown*, said during a long night of celebration, "I was so happy, I was numb." A little bit later he predicted that all of the schools in the south and everywhere else would be desegregated by January 1, 1963, the hundredth anniversary of the Emancipation Proclamation. Ralph Ellison wrote in a letter to a friend, "What a wonderful world of possibilities are unfolded for the children."[2]

It was my assumption when I undertook this book that *Brown* was a pivotal moment in American history, and that Ellison's comment was prophetic. The further I got into the research, however, the more I began to have doubts about its long-term legacy. Did the decision in fact come even close to accomplishing the wonderful things that Ellison and the *Amsterdam News* and Thurgood Marshall and various others thought it was going to do in 1954?

James T. Patterson is Ford Foundation Professor of History, Brown University; and author, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (Oxford University Press, 2001); *Congressional Conservatism and the New Deal: The Growth of the Conservative Coalition in Congress, 1933-1939* (University of Kentucky, 1967); *Mr. Republican: A Biography of Robert A. Taft* (Houghton Mifflin, 1972); *The Welfare State in America, 1930-1980* (British Association for American Studies, 1981); *Dread Disease: Cancer and Modern American Culture* (Harvard University Press, 1987); *Grand Expectations: The United States, 1945-1974* (Oxford University Press, 1996; recipient, Bancroft Prize in History); *America in the Twentieth Century* (Harcourt Brace, 4th rev. ed., 1999); and *America's Struggle Against Poverty in the Twentieth Century* (Harvard University Press, 2000). He is also a recipient of fellowships from the Guggenheim Foundation, National Endowment for the Humanities, and Woodrow Wilson International Center for Scholars.

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I will focus on just two of the many legacies of the case. One is its impact on the civil rights movement; the second, its impact on school integration or desegregation and the quality of education.

Chronology once seemed to make the impact of the decision on the civil rights movement obvious. A year and a half after *Brown* was handed down in May 1954, the historic Montgomery school bus boycott took place, and Martin Luther King, Jr. emerged as a major civil rights leader. Those events were followed by the Little Rock case of 1957, when Governor Orville Faubus attempted to prevent desegregation of Central High School. Little Rock became another milestone. It led the Supreme Court to slap Faubus down, and it led President Dwight Eisenhower, in spite of his distaste for the decision, to send in troops to enforce what amounted to no more than token desegregation – but even that token desegregation probably would not have taken place had it not been for *Brown*. The Freedom Rides of 1961 were scheduled to arrive in New Orleans on May 17, 1961, the seventh anniversary of *Brown*. The timing was one of many testaments to the symbolic value of the decision. The Freedom Riders did not reach New Orleans on time, however, because of all the violence they encountered en route.

William Chafe was one of the first historians to look carefully at the civil rights movement in *Civilities in Civil Rights*, a study of Greensboro, North Carolina.[3] The city's school board, which met on May 18, 1954, the day after *Brown* was handed down, agreed unanimously to carry out the decision. There were great expectations in Greensboro, as in other places, that integration would take place. Very shortly thereafter, however, the Greensboro Board reneged, and as Chafe points out, Greensboro was in fact the last major city in North Carolina to desegregate its schools.

Three of the four black students who started the historic sit-ins at the Woolworth's store in Greensboro, on February 1, 1960, grew up in Greensboro. Despite the hopes of 1954, their education had taken place in segregated schools. It is Chafe's view that their anger, and that of many other black students who participated in what became this famous wave of sit-ins, stemmed from the rebuffs that the South gave to school desegregation between 1954 and 1960.

So there seems to be a clear chain of causation leading from *Brown* to the sit-ins, the Freedom Rides, major demonstrations, and then to the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

But the more I looked into this history, the more uncertain I became. As Gerald Rosenberg's *The Hollow Hope* indicates, it is not so clear that the *Brown* case had a major effect upon the escalation of the civil rights

movement in the late 1950s or the 1960s.[4] Rosenberg and others point out that the attention given to civil rights in the late 1950s by the press or, for that matter, the American Bar Association, which was full of criticism of the decision, was really rather modest. Indeed, the press of those days was not particularly focused on judicial events: Anthony Lewis did not become the first Supreme Court correspondent for the *New York Times* until the mid 1950s. Overall, the white population didn't give much heed to civil rights. One of the best known of the substantial number of books about the civil rights decades is by historian Harvard Sitkoff.[5] It covers 1954 to 1992 and it, like similar books, suggests that there was a straight line of causation from *Brown* on. But an examination of major outlets in the late fifties, such as the *New York Times* or major magazines or others indexed in the *Guide to Periodic Literature*, reveals that little attention was paid either to the case or to civil rights.

In 1958 the Gallup Poll asked Americans to list their ten most admired Americans. One of the ten was Orville Faubus... [that] provides some sense of the racial climate of the United States in the late 1950s.

Another indication of attitudes in the late 1950s: in 1958 the Gallup Poll asked Americans to list their ten most admired Americans. One of the ten was Orville Faubus. Presumably most of the people who said they admired him were from the South, but the poll nonetheless provides some sense of the racial climate of the United States in the late 1950s.

Rosenberg and others have pointed out that one would have expected the number of civil rights demonstrations in the United States to have increased after *Brown v. Board*, particularly when the South thumbed its nose at the decision as it did in the late fifties. In fact, there were fewer civil rights demonstrations in most of the late 1950s than there had been in 1943 or in 1946, 1947, and 1948, when there was a fair amount of demonstrating led particularly by returning black war veterans who had fought a war to save democracy but came back to a Jim Crow South. There was no steady escalation of demonstrations during the first five or six years after the decision.

One is also struck by the limited impact of the decision on national politics. In 1956 Autherine Lucy, a black woman, attempted to go to the University of Alabama. She was hounded out of town and was never able to enroll. This led reporters covering the 1956 presidential campaign to ask both Adlai Stevenson and Dwight Eisenhower whether they would ever send in troops or in other important ways enforce *Brown v. Board*. Both candidates said they could never imagine any circumstances under which that would happen. Eisenhower of course had to eat his words, however reluctantly, in 1957. But he made it clear at the time that he was doing so not because he had any sympathy with *Brown*, which he never endorsed, but because he felt it his duty as commander-in-chief to preserve order in Arkansas.

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Similarly, civil rights did not emerge as a key issue in the 1960 presidential campaign between John F. Kennedy and Richard M. Nixon. True, toward the end of the campaign, the Kennedys helped Martin Luther King get out of jail, and the black vote may well have had an important effect in swinging that extraordinarily close election to Kennedy. But civil rights were nonetheless a peripheral issue. Kennedy's inaugural address, the famous "Ask not what your country can do for you" speech, contained almost no mention of domestic concerns. He, like Nixon, was deeply wrapped up in Cold War issues.

Brown II, the second *Brown v. Board of Education* decision handed down in May 1955, contained the famous statement that the desegregation process was to be carried out with "all deliberate speed." What exactly did that mean? No one seemed to know. Thurgood Marshall said later that he finally figured out what it meant, and he spelled it out: S-L-O-W. And slow it was. The Supreme Court's decision was ignored or deliberately violated in all of the southern states. Ten years after *Brown*, in 1964, only an estimated 1.2% of black children in the eleven states of the old Confederacy attended public schools with white children.

It is the force of that kind of resistance over ten years that Gerald Rosenberg makes so much of in *The Hollow Hope*. Michael Klarman, another leading revisionist, made many of the same points in a very important article in the 1994 *Journal of American History*, in essence agreeing that the Supreme Court made its decision, little happened, and therefore courts are often limited agents of social change.[6] Rosenberg looks at the areas of desegregation, women's rights, and abortion rights, and shows how little the Court actually accomplished. If the Court hadn't involved itself, Rosenberg adds, protest might have emerged more quickly as militant demonstrations, which in fact brought forth concrete gains.

Revisionists also argue that things might have worked out differently if the Court had stayed away from the issue of schools in its emphasis on racial justice. Had it turned instead to other issues such as public accommodations, the ending of discrimination in employment, voting rights, or transportation, they say, perhaps things would have been different because these are less sensitive areas. The South might gradually have accommodated itself to change without resorting to the massive resistance of the 1950s. Therefore, revisionists contend, it was perhaps counterproductive to go the education route.

I don't have a lot of faith in these arguments, which are sometimes summarized as the "backlash thesis." It seems to me that while the foes of integration in public accommodations, changes in employment and other such

things were perhaps less excited than were the opponents of school desegregation in the 1960s, there was nonetheless a lot of white anger and some violence. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 brought dramatic changes in our race relations laws. Along with the Social Security Act, those laws were the most important pieces of American legislation of the last 150 years. Absent the civil rights movement and all the turmoil of the early 1960s, they might not have passed. I don't believe, in short, that *Brown* made things worse.

I would also point out that the case did have some impact. We tend to forget that in 1954 segregation was mandated not only in eleven southern states but in six others, and was optional in four more. It also existed in the District of Columbia. So there were twenty-one states where segregation was either mandated or possible, Kansas among them. Richard Kluger reports in his magisterial book, *Simple Justice*,[7] that there were 11,500,000 white and black children, 40% of all American school children, affected by segregation policies in the southern and border states in 1954. We tend to forget that *Brown* changed this relatively quickly in most of the border states.

Other historians have suggested that *Brown* encouraged some northern states to enact laws against racial discrimination in employment and in public accommodations, and that it also had a liberalizing effect on some labor unions.[8] In other words, the Supreme Court's statement encouraged acceleration of a process already under way.

The Court also quietly handed down a number of *per curiam* decisions in the late 1950s that showed that the Court considered *Brown* applicable to areas other than education.[9] By 1960 it was clear that the *Brown* doctrine would apply to buses, municipal golf courses, beaches, and public parks as well as schools; that segregation in these places was equally unconstitutional.

As Douglas Reed has pointed out, the *Brown* decision was also relied upon later by states in their efforts to bring about greater equalization of resources and quality of education in the schools.[10] *Brown*'s arguments and language have been used and continue to be used by a number of state courts.

Finally, there is the symbolic value of *Brown*. The Freedom Riders of 1961 certainly were inspired by the decision. On May 17,1957, Martin Luther King staged a prayer pilgrimage in Washington, D.C. The point here is that the Court had spoken. This had an effect – hard to pin down and quantify, but there nonetheless.

My friend John Dittmer has written a wonderful prize-winning book on Mississippi called *Local People*.[11] He argues in it that even in Mississippi in 1954 and 1955, a lot of black people were extraordinarily heartened by *Brown* and expected their children to go to desegregated schools in the

near future. Of course, as Dittmer notes, they were cruelly rebuffed by both the "all deliberate speed" compromise of *Brown II* and by the refusal of the Eisenhower administration and other political leaders to stand behind *Brown* and make it clear that resistance would not be tolerated.

In short, there was a symbolic role here, even though it is hard to prove. The decision was indeed in the minds of many of the protestors in the early 1960s, even if their articulated goals were the ending of racial discrimination in public accommodations, employment, and voting rather than desegregation of schools.

In 1954 and 1955, a lot of black people were extraordinarily heartened by *Brown* and expected their children to go to desegregated schools in the near future. Of course...they were cruelly rebuffed.

But ceding all of this, I continue to wonder how pivotal *Brown* was. I close my book with a quotation from Jack Greenberg, who was Marshall's right-hand man in many of these cases and who later succeeded him as head of the NAACP Legal Defense and Education Fund. In 1994 Greenberg wrote, "Altogether, school desegregation has been a story of conspicuous achievement flawed by marked failures, the causes of which lie beyond the capacity of lawyers to correct. Lawyers can do right, they can do good, but they have their limits. The rest of the job is up to society."[12]

My second question is about *Brown*'s impact on the pace of desegregation and the quality of schools. The decision finally was enforced in the South in the 1970s, and it is estimated that by 1980, 38% of African-American children around the nation attended schools that were 50% or more white in student population. It had been only 22% in 1968; the change by 1980 obviously resulted from the belated desegregation of the southern schools after 1969.

This was a considerable change. People who went to Jim Crow schools and who have done well in life criticize me for not giving these schools sufficient credit but, as Kluger's book details, those schools were very inadequately supported by public authorities. Washington, D.C. was one of the segregated areas at issue in the cases combined in *Brown*.[13] The total equipment in the science laboratory in the black Washington, D.C. junior high school involved in the case was a goldfish bowl with one goldfish, and a Bunsen burner. Of course there were some good black schools and any number of dedicated black teachers, administrators, coaches and so on. But I think we should get away from the notion that most of these were places in which a lot of learning could occur.

Another thing I should point out is that the amount of money the U.S. has spent on public education since 1970 in real dollars per student has been astronomically higher. Whether more money means better education is of course a big issue, but the best statistics suggest that the increase in per stu-

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dent public school spending between 1970 and the year 2000 in real dollars has been around 60%.

There are doubts, however, about the virtues of desegregation. W. E. B. Du Bois was a founding member of the NAACP and a lifetime supporter of integration. By the 1930s, he had become somewhat disillusioned about the value in all cases of integrated schools, and in 1935 he wrote, "A separate Negro school, where children are treated like human beings, trained by teachers of their own race, who know what it means to be black...is infinitely better than making our boys and girls doormats to be spit and trampled upon and lied to by ignorant social climbers, whose sole claim to superiority is ability to kick 'niggers' when they are down."[14] Du Bois was not opposing desegregation or integration but suggesting that under some circumstances, there was a lot to be said for sending black kids to good *black* schools - providing, of course, that it was done voluntarily, rather than mandated by the state.

Linda Brown Thompson, the Brown of *Brown v. Board*, said on the fortieth anniversary of the case in 1994, "Sometimes I wonder if we really did the children and the nation a favor by taking this case to the Supreme Court."

Du Bois was not the only person to have doubts. Clarence Thomas, in the important 1995 Kansas City case of *Missouri v. Jenkins*, took direct aim at the psychological argument developed by Kenneth and Mamie Clark that was enshrined in the famous footnote 11 of *Brown*.[15] The Clarks argued that black children sent to all-black segregated schools suffered psychological damage that interfered with their ability to learn. Thomas could not have been more contemptuous of what he saw as the argument that black students going to black schools were psychologically worse off than they would be if they sat next to a white kid in school. Thomas wrote, "the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development...not only relies upon questionable social science rather than constitutional principle, but it also rests on an assumption of black inferiority."[16] Thomas' view is not the same as that of Du Bois, but it raises the same question: under some circumstances, what's wrong with a good black school?

Linda Brown Thompson, the Brown of *Brown v. Board*, said on the fortieth anniversary of the case in 1994, "Sometimes I wonder if we really did the children and the nation a favor by taking this case to the Supreme Court. I know it was the right thing for my father and mother to do then but after nearly forty years we find the Court's ruling unfulfilled."[17] She went on to suggest that it probably couldn't or wouldn't be, given the nature of American society.

Elizabeth Eckford was one of the nine black children who got caught up in the Little Rock controversy in 1957. Eckford said in 1997, forty years after Little Rock, "There was a time when I thought integration was

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one of the most desired things...I appreciate blackness more than I did then."[18] And there are other examples of disenchantment with *Brown*. Jack Balkin recently edited a collection of essays by law professors entitled *What Brown v. Board Should Have Said*.[19] Derrick Bell, a leading black law professor, said in it that had he been on the Supreme Court in 1954, he would have voted against *Brown v. Board*. He would have insisted instead that the Court require segregating states to make "separate but equal" really equal - maintain the "separate but equal" doctrine of *Plessy v. Ferguson* but insist that the facilities be equal. People like Bell wonder if there is really much reason to think that sending blacks into a white school and sitting them down next to whites is going to make them better people, going to make them more or less tolerant, going to change the whites very much or going to improve the education of either race.

Many of these commentators point to realities such as the black/white "test score gap," segregated tracking within schools that are supposedly integrated, and resegregation of schools. Numbers tell the story. As I mentioned earlier, in 1980, 38% of black public school children were in schools which were 50% or more non-black. By 1996 this number had dropped to 32%. In 1996, the percentage of black kids in schools that are 90% or more black - which really means they're black schools – was 35%, up from 33% in 1980. What's happening is a process of creeping resegregation. We see this in housing as well, in the development of black suburbs. Residential movement throughout American history has been and continues to be very different for blacks than it has been for white immigrants.

There is near-total segregation in cities like Detroit and Chicago. It is not legally mandated, to be sure, but the result of demographic movements. Per capita spending on schools varies enormously and because of the Supreme Court's *Rodriguez* decision of 1973, there is no real way for the federal government to force equal resources in schools.[20] The differences within states are quite large.

Race relations in this country have come a long way since 1954. The alteration in race relations between 1900 and the 1960s was so glacial as to be scarcely perceptible, but the enormous changes that occurred in the 1960s have persisted despite various conservative efforts since then. Most of these gains, as in voting, for example, have lasted. Public opinion polls report that the vast majority of Americans believe in integrated education and wish there were more of it.

I consider the idea of separate but equal schools pernicious. Sending black kids and white kids to school together does not necessarily make black kids into better students, but it certainly is an opportunity they

ought to have if they want it. It can open up all kinds of doors and opportunities and networking that they are unlikely to get if they are stuck in a poorly funded or even a well funded all-black school.

But having said that, I remain ambivalent about the role of *Brown*. Were Ralph Ellison alive today, he surely would have to wonder whether his prediction that *Brown v. Board of Education* opened up a wonderful world of possibilities for the children has proven correct.

NOTES

1. James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (Oxford University Press, 2001).

2. Quoted in Patterson, *Brown v. Board of Education*, pp. xii–xiv.

3. William H. Chafe, *Civilities in Civil Rights: Greensboro, North Carolina, and the Black Struggle for Freedom* (Oxford University Press, 1980).

4. Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 1991).

5. Harvard Sitkoff, *The Struggle for Black Equality, 1954-1992* (Hill and Wang, 1993).

6. Michael Klarman, "How Brown Changed Race Relations: The Backlash Thesis," 81 *Journal of American History* 81–118 (June 1994).

7. Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (Knopf, 1975).

8. *See* V. P. Franklin and Bettye Collier-Thomas, *My Soul Is a Witness* (Henry Holt, 2000).

9. *Per curiam* decisions are short, unsigned decisions which frequently cite earlier decisions rather than spelling out the justices' reasoning.

10. Douglas S. Reed, *On Equal Terms: The Constitutional Politics of Educational Opportunity* (Princeton University Press, 2001).

11. John Dittmer, *Local People: The Struggle for Civil Rights in Mississippi* (University of Illinois Press, 1994).

12. Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (Basic Books, 1994), p. 401.

13. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

14. W. E. B. Du Bois, "Does the Negro Need Separate Schools?," 4 *Journal of Negro Education* 328–335 (July 1935).

15. In the *Brown* decision, Chief Justice Earl Warren quoted the United States District Court for the District of Kansas, which had written, "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." *Brown v. Board of Education*, 98 F.Supp. 797, at 880–881. Warren continued,

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"Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. n11 Any language in *Plessy v. Ferguson* contrary to this finding is rejected." Footnote 11 cited the work of a number of social scientists: "K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950) ; Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44-48; Frazier, The Negro in the United States (1949), 674-681. And see generally Myrdal, An American Dilemma." *Brown v. Board of Education*, 347 U.S. 483 (1954), at 494-495. During the litigation, Kenneth Clark testified about the Clarks' findings that black school children in segregated schools, asked to choose between white and black dolls, liked the white dolls better and chose them rather than the black dolls.

16. *Missouri v. Jenkins*, 515 U.S. 1139 (1995), at 97 (Thomas, J., concurring).

17. Quoted in Patterson, *Brown v. Board*, p. 207.

18. Quoted in Patterson, *Brown v. Board*, p. 208.

19. Jack M. Balkin, ed., *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (New York University Press, 2001).

20. *San Antonio v. Rodriguez*, 411 U.S. 1 (1973), holding that there is no constitutional right to an education.

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The Importance of *Brown v. Board*

Roger Wilkins

Professor Patterson's book is a wonderful piece of research, terrific writing, and very provocative. But anybody who doesn't think that *Brown v. Board* made a difference isn't following Big Ten football. When I went to the University of Michigan in the mid-1950s, the Big Ten was the best football conference in the nation. The southern schools had all white boys; no black athletes. But in 2001 the Big Ten was whipped about four to nothing in Bowl games by the Southeast conference. In football, speed kills, and Florida has got speed and the rest of those southern schools have got speed. And when I look at basketball games and I see the University of Alabama sending five black starters onto the floor and remember the struggles to integrate it back in the 1960s, I'm looking at a different country.

I was an intern for Thurgood Marshall in the summer of 1955, working on some of the mop-up work after *Brown v. Board*. I believe deeply in integration. I've also been a member of the Washington, D.C. school board for a year and I haven't used the word "desegregation" once in all of my work on it. Those statements may sound like contradictions but perhaps I can explain them.

I was born in Kansas City, Missouri, seventy years ago, so I remember segregation. I was born in a segregated hospital. My first educational experience was in a one-room segregated schoolhouse. When it closed I, a five year old, was bused way across town to a segregated elementary school. My father died when I was eight and we moved to New York, where I was taught by white teachers in a *de facto* segregated school in Harlem.

Then my mother remarried and in the early 1940s we moved to Grand Rapids, Michigan, where all of a sudden I found myself the only black kid in a virtually all white school. Boy, was that painful. But it was useful, because it taught me something that I could never have learned in a segregated school. You really have to feel it to understand the grinding weight on a kid's soul of segregation, of a society that tells you in every way it can

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think of - economically, culturally, politically and legally - that you are inferior and second class, no matter what your parents may tell you. The message that envelops you from people in power makes it very difficult for you not to feel inferior, not to be ashamed of your thick lips and your broad nose and your brown face and your kinky hair.

In that integrated school I learned that whites weren't super people. I learned that they weren't all smarter than I was. A lot of them, in fact, were not nearly as smart as I was, and relatively few of them were smarter. Some were better basketball players, some were worse. Some of them were really lousy people; some were really lovely people who are still friends of mine today. I could not have learned those things in segregation and I could not have been as effective a citizen in this country had it not been for those experiences with my white classmates in Grand Rapids.

Now as for *Brown*: While I obviously can't speak for every black person of my generation and some would disagree, for me, May 17, 1954 was a second emancipation day. That's because *Plessy v. Ferguson*,[1] which in effect said that the Declaration of Independence, the 13th, 14th and 15th Amendments to the Constitution of the United States, the Gettysburg Address - all those good documents - apply to other people but not to you, was a stake in our hearts. *Plessy* in effect said, "You are so inferior that the Supreme Court had to carve out an exception from those documents for you, keep you separate, and that separation – which is invariably unequal - represents your own inequality." However often you told yourself that was a lie, it was very difficult to ignore the fact that the Supreme Court had found no reason to change its mind from the time *Plessy* was handed down in 1896.

It is of course perfectly true that courts can't make a difference if the executive branch doesn't do its enforcement job, and after *Brown*, President Eisenhower didn't do his job. He lived in the South as a kid and had come up in a segregated institution, the United States Army, and he just didn't believe in integration. That was particularly sad because he was the most popular man in the country. Had he just given his approval in ringing words, it would have made a great difference.

But the interesting thing is what the resistance to *Brown* accomplished. If it did nothing else, the resistance raised consciousness. Maybe white people weren't thinking about *Brown*, maybe civil rights didn't get much coverage in the *New York Times*, but black people were thinking and talking about the resistance, and we were getting madder and madder and madder. I do believe that the *Brown* decision had something to do with emboldening the black people in Montgomery. After all, the people who planned the bus boycott were the NAACP, and they were people who were in step with *Brown*. And no matter where we were, we identified totally with

Elizabeth Eckford, with Ernie Green and the others in Little Rock, with the people in Plaquemine Parish in Louisiana, and with the people in Clinton, Tennessee, all facing that resistance. So it seems to me that all of the tinder for the 1960s was built up in the late 1950s.

We didn't know then...that racism was at the core of American culture. We didn't understand how deeply white skin privilege was ingrained in the culture and the power structure of the country.

If Thurgood Marshall had lost *Brown v. Board* in 1954 blacks would have been devastated, but he won, and blacks felt empowered. Black lawyers accomplished that. Of course they had help from fine white lawyers, but black lawyers accomplished that; the NAACP accomplished that; and black people were relieved of some of the impotence the society had imposed upon us.

But then, you might ask, if I've lived through all of that history and if I believe deeply in integration, why am I on the school board and not talking about desegregation?

It's because we know more now than Thurgood or Bob Carter or Kenneth Clark or I did back in the early 1950s. We were really naive. Most of us thought that racial meanness was an individual thing. We talked about it as prejudice. We even had our particular demons - Senator Bilbo of Mississippi and the Talmadges of Georgia were prime examples – but the black movement was a middle class movement. The few white people we knew were liberal white people who would join the NAACP, so we thought white people were pretty good people. We thought that the more that white people were exposed to people like us, the sooner they would conclude that gee, these people aren't what we thought they were, they are regular people, they're Americans, and we'll hang around with them and let our kids go to school with them. As Richard Kluger quoted Bob Carter as saying, "We really had the feeling then that segregation itself was evil - and not a symptom of the deeper evil of racism...The box we thought we were in was segregation itself."[2] What we didn't know then was that racism was at the core of American culture. We didn't understand how deeply white skin privilege was ingrained in the culture and the power structure of the country.

And so here we are in this residentially divided city, where race, class and geography are so important. That has an impact on schools. What we have to do is improve the schools where the poor black kids live. It is not a given that you get a terrible education in an all-black school; you simply get an incomplete education, just as you get an incomplete education in an all white school. But given the distribution of resources, we can't emphasize desegregation; we have to emphasize the best education.

NOTES

1. Plessy v. Ferguson, 163 U.S. 537 (1896).
2. Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (Knopf, 1975), p. 534.

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Measuring the Impact of Brown v. Board

Douglas S. Reed

The key question here is, did *Brown* do anything? Did it really matter? If we answer yes, then the question is, what good did *Brown* do?

James Patterson's wonderful book neither glosses over the good things *Brown* did nor denies the inadequacies of the people and the institutions who sought, designed, and implemented it. I would like to expand on some of the themes that emerge from his retelling and that merit discussion beyond the framework and chronology of *Brown* and its progeny. The first distinction worth making is the difference between racial oppression and racial conflict, because what *Brown* did needs to be situated in that context. Second, there is the subject of rights consciousness: questions about whether one pursues one's rights within legal institutions or outside legal institutions, and what it means to have a right and fight for a right in courtrooms or in the street. Finally, I will look at notions of racial neutrality. This raises the issue of a color-blind Constitution and the problem of metrics; that is, how do we measure social outcomes and the impact of politics on different groups?

First, racial oppression and racial conflict. Professor Patterson's book goes back and forth on the subject of whether the pursuit of integrated schools was the right way to pursue racial progress for African Americans in the mid twentieth century. This is the "on the one hand and on the other hand" school of historical research. On the one hand, some argue that educational quality in and of itself is sufficient. Schools for African

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American children should be improved; we should focus on good schools regardless of whether they are integrated. Others, however, argue that racial integration is necessary for the achievement of full and equal citizenship for African Americans.

The irony is that both are right. The problem is that they're talking about two different things, but *Brown* embodied both.

Segregated education, not segregated movie houses or drinking fountains, was the foundation of Jim Crow. Segregated education was the line of demarcation between oppressor and oppressed; it policed the boundary of the racial hierarchy.

The first approach focuses on the individual dimensions of public education: what a child needs to learn in order to thrive within society. The second focuses on the social or collective dimension of public education. The problem for Thurgood Marshall and the NAACP was that public schools are the vehicle for achieving both of these things, and segregated education was cruelly efficient at generating harms both to individuals and at the collective level. For individuals, segregated education in grossly inferior one-room tar paper shack schools all but eliminated opportunities for personal advancement and damaged some people permanently.

Segregated education, not segregated movie houses or drinking fountains, was the foundation of Jim Crow. Segregated education was the line of demarcation between oppressor and oppressed; it policed the boundary of the racial hierarchy. Which side of that line you stood on determined where you could go in the world. Even if you were fortunate enough to be educated in one of the few excellent segregated schools, you faced severely limited horizons. The classic example is W.E.B. Du Bois. The first black American to get a Ph.D. from Harvard, he could not find an academic appointment at a white institution in the United States. That was the point at which the confinement of the horizon was most cruel.

Brown therefore had its most transformative power in the collective dimension, in its impact on racial oppression, and not necessarily on racial conflict. Along with the kind of direct action and protest led by Martin Luther King and others, *Brown* eventually destroyed the capacity of white supremacists to maintain powerful lines of social demarcation between whites and blacks. The physical enforcement of *Brown* by soldiers with guns brought down a legalized system of racial hierarchy. It eliminated segregation, and Jim Crow, as an ideal. Polls in the 1950s reported a high percentage of people who said that white kids and black kids should not go to school together. By the 1970s, only about four to six percent of the American population said schools should be segregated by law, and those folks were viewed as almost a lunatic fringe.[1] Segregated education was no longer a viable ideal. *Brown* did that.

What *Brown* didn't do was create a better educational system that conferred individual advantages on all school children. Integration in and of

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itself does not necessarily produce a better learning environment. Studies show that under particular circumstances, integration can create better learning opportunities, but test scores show that integration alone will not do the trick. That of course does not mean that integration should not be undertaken; instead, it means that the conditions under which integration produces social conflict have to be minimized through strong executive leadership – that of the president, governors, mayors. Leadership was the key to the different experiences of Buffalo and Boston, which went through an integration struggle at the same time but had vastly different results in terms of how kids were able to learn.[2]

So we must view *Brown* with an awareness of the difference between racial oppression and racial conflict. *Brown* profoundly challenged and changed the ability of white supremacists to engage in racial oppression. It was too much to expect that Thurgood Marshall and the NAACP and the Supreme Court and the "fifty-eight lonely men" at the federal district court level could also provide us with an educational system resulting in high test scores for all school children.[3] It is simply not the same kind of task.

The second thing I want to address is the notion of rights consciousness and a liberal commitment to an ideology of law. Nothing in Thurgood Marshall's speeches or in the accounts of him in James Patterson's book or elsewhere suggests that he was a naive man. He seemed to have a firm understanding of power: who had it, who wielded it, and who was vulnerable to it. Yet, ironically, much of his work in the NAACP was premised on the remarkable proposition that an unfair and distorted legal system that denied basic civil rights and liberties to African Americans could be used to gain advantage for those who had no political power. It is an insane idea on its face. Why try to achieve your objectives through a system that is so stacked against you? Why should a legal system that formally relegates African Americans to second or even third class status find within itself the resources to obliterate those legal distinctions? How can a legal system that is the foundation of these distinctions be the means by which to eliminate them? And all that Thurgood Marshall had for encouragement was the Fourteenth Amendment to the Constitution.

The Fourteenth Amendment says in part, "No state shall...deny to any person within its jurisdiction the equal protection of the laws." That was in some respects a hollow promise, particularly to the roughly 3,000 people who were lynched and tortured without any protection of law between the 1880s and the 1930s. "Separate but equal" was a kind of wallpaper that rationalized the hollow promise for jurists, but the promise simply didn't exist as a lived reality. And yet time and time again,

Marshall returned to the notion that the Constitution was more than a parchment protection. His was a visceral response. He seemed utterly convinced that the Constitution actually meant what it said, even if that flew in the face of the experience of millions of black southerners. It was a powerful constitutional faith.

The faith existed even after *Brown II* which, if he thought about it, was a bit of a setback for Thurgood Marshall. Professor Patterson's book quotes him: "'The more I think about it, I think it's a damned good decision!' The South, he added, has 'got to yield to the Constitution. And yield means yield! Yield means give up!'"[4] He was committed to the idea that the law means something durable and robust, even if nobody else is listening.

One of the tragedies of this story and of *Brown* is the loss of that idea. Linda Brown's comment that perhaps *Brown* should not have been brought may indicate the loss of constitutional faith. Faith in the impartiality of law, and especially the impartially of the Supreme Court, may have been damaged further by the election of 2000.

It is the notion of the impartiality of law that brings me to my final point, about the question of standards or metrics or norms, and how one evaluates what is racially neutral. Pamela Grundy's wonderful book, *Learning to Win: Sports, Education, and Social Change in Twentieth Century North Carolina*,[5] details the experiences of athletic teams in twentieth century North Carolina. One chapter contrasts the relatively successful desegregation of athletic teams in that state, within a fairly short period, with the jarring and complicated problem of desegregating cheerleading squads. It may seem like an insignificant problem but it is not, because if schools are going to be integrated, extracurricular activities must be integrated, whether they are sports or cheerleading or something else.

The relative success in integrating athletic squads, and this goes back to Roger Wilkins' point, was due to the fact that there was a clear metric of performance. Can you hit a jump shot? Are you the best shooter? Are you the best hitter? Are you the fastest? If you can do it, you're on the team.

But cheerleading raises all kinds of very subjective and thorny questions. How do you select a cheerleading squad? Do you do it on the basis of popularity? Do you do it according to some standard of beauty? Do you do it according to dancing ability? Who judges the moves, and by what criteria? All of this is bound up in very complex cultural contests over beauty, appropriate behavior, sexual mores, social popularity. A point guard or running back has it much easier, in that sense, than an aspirant for the cheerleading squad.

Many of the continuing conflicts of the post-*Brown* era arise because in a larger analytical sense, we are faced with the equivalent of integrating cheerleading squads. The standard by which we should judge integration is unclear, and this is particularly true about measures of opportunities for social and educational advancement. What are the appropriate criteria for people who are admitted to higher education or graduate education? Is getting into law school like being the fastest running back, or is getting into law school like being evaluated as an applicant for the cheerleading squad? If it is like trying to get on an athletic team, then the metric is clear: it is test scores and grades. But if it is more like choosing cheerleaders, then candidates for law school and graduate school have to be assessed according to a very different set of skills.

Brown doesn't provide us with easy answers. In a sense, it's good to have these problems; certainly, it is better to have the problem of how to measure the success of *Brown* than to be back in the era of segregation. What we have to remember is that the expectation that *Brown* would eliminate racial conflict was hopelessly naive. *Brown* generates racial conflict because it needs to, because we've progressed, and in some ways that is a very hopeful thing.

NOTES

1. Christine H. Rossell, "The Convergence of Black and White Attitudes on School Desegregation Issues," in Neal Devins and Davison M. Douglas, eds., *Redefining Equality* (Oxford University Press, 1998), p. 123.

2. See, generally, Steven J. L. Taylor, *Desegregation in Boston and Buffalo* (SUNY Press, 1998).

3. The phrase is from Jack Peltason, *Fifty-Eight Lonely Men* (Harcourt, Brace, 1967).

4. James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (Oxford University Press, 2001), p. 85.

5. Pamela Grundy, *Learning to Win: Sports, Education, and Social Change in Twentieth-Century North Carolina* (University of North Carolina Press, 2001).

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State Courts and Educational Finance

Douglas S. Reed

A recent *New York Times* op-ed article touches on a number of themes relevant to the topic of educational equity. Written by Adam Cohen, it is entitled, "After Ten Long Years, Alabama is Back Where it Started,"[1] and it expresses a sense of futility about the ability of school finance lawsuits to change the way schools are funded and the level of resources available to them. Cohen addresses the theme of race and class-based denials of educational opportunity, which is at the forefront of our discussion.

The following is organized around three main points. First, I will present a quick overview of the trajectory from the school desegregation lawsuits to the school finance lawsuits or, as I term it in *On Equal Terms*, the progression from race to class in court interventions in the area of public education.[2] Then I will argue that these school finance suits do, in general, make a difference, and that whether or not the plaintiffs in these cases win does matter for the operation of schools. Finally, I will discuss the way racial and class inequities in public education are distinctive but also share a moral and normative linkage. They resonate in a similar key in spite of the profound differences between the two.

First, the trajectory. Beginning in the late 1960s and continuing into the early 1970s, the NAACP's campaign against school segregation moved into a remedial phase during which courts evaluated various desegregation remedies available to school districts. Litigation in those years also moved from the South to the North and West, into districts like Denver and Boston that had *de facto* rather than *de jure* segregation.[3] As those conflicts unfolded, many people began arguing that simply putting a black child next to a white child in a school would not, in and of itself, change the educational opportunities those children enjoyed. The argument became particularly obvious and acute when the result of the desegregation effort was to put white children from poor neighborhoods into schools with black children from poor neighborhoods, reflecting the class dimension of the desegregation effort. Children were being moved from one poorly funded school to another, and the logical question was whether that really addressed the problem that concerned Thurgood Marshall and the NAACP.

As a result, a number of litigators filed lawsuits aimed not at the composition of the schools but at the way the schools were funded. Their initial

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claims, filed in federal courts, asserted that the disparate levels of funding among schools violated the equal protection clause of the U.S. Constitution ("No state shall...deny to any person within its jurisdiction the equal protection of the laws"). Cases were brought first in California (*Serrano v. Priest*) and then in Texas (*Rodriguez v. San Antonio*).[4] *Serrano* became the occasion for the first federal court decision striking down a system of school financing.

The decision in *Rodriguez* was appealed to the Supreme Court. In 1973, in spite of the enormous difference in the amount of money available to different school districts in Texas, the Court ruled that the state's system of funding schools did not violate the U.S. Constitution.[5]

The Court offered two primary reasons for its decision. Noting that there is no education clause in the U.S. Constitution, the Court declared that education is not a fundamental constitutional right. Therefore, Justice Lewis Powell wrote for the majority, the plaintiffs had no basis for their claim that there was a robust substantive right to education. This was a major shift from *Brown*. In that case, the Court called education one of the most important functions of state and local governments. It thereby implied that education was a robust right if not one that could be labeled fundamental in legal terms.[6]

The second reason, which had ramifications beyond the realm of school finance, was that poverty did not constitute a suspect classification for the purposes of the Fourteenth Amendment. When a classification such as race is labeled "suspect" by the Court, the burden falls on the government to prove that any law that categorizes by race is legitimate.[7] It is a high standard to meet and as a result, the government will usually lose. Where a classification is not suspect, the burden falls on the plaintiff to prove that the categorization embodied in a particular statute is unconstitutional. Plaintiffs lose more of those cases than not. Until *Rodriguez*, there had been some question about whether poverty was a suspect classification, but the *Rodriguez* court held that it was not. The result was that policies treating the poor and the non-poor differently were constitutional.

The litigators, however, were not ready to give up. Unable to rely on the federal constitution, they turned to state constitutional provisions in those states with a clear constitutional commitment to public education. They began basing their cases on recently enacted state equal rights amendments, or on older equality language in state constitutions, or on state constitutions' education provisions.[8]

The first decision in the new kind of case came down thirteen days after *Rodriguez*. Of course the lawsuit was not filed and decided within thirteen days. Litigation had begun earlier in New Jersey, the decision of the lower courts in the case had been appealed, and thirteen days after *Rodriguez* the

New Jersey Supreme Court ruled that the New Jersey finance system violated the New Jersey state constitution.[9] Between 1973 and 2001, there were thirty-six such cases decided by state supreme courts. That means over two-thirds of the states have ruled on the issue to date; the plaintiffs have won in about half of the cases.[10]

Race isn't central to those cases. Some of them, such as those from New York and Connecticut, have a racial component.[11] The cases are based primarily on other arguments, however, involving claims of inadequacy or inequitable distribution. It is the combination of high property values in some districts and heavy reliance on local property taxes in all districts that accounts for the inequities. Local control and the local property tax constitute the institutional foundation of public education, but they generate unequal distribution. The property-based U.S. public educational finance system is in effect designed for inequality, and yet the degree to which states comply successfully with these court decisions is measured by the extent to which they overcome the inequitable machinery. This leads to the second point for discussion, which is how far the states have moved towards compliance in those cases where plaintiffs have won.

Winning really does matter. If we look at adequacy of funding and the goal of raising the floor that the state provides for education, we can see a modest consequence for winning. On average there has been a general trend in the increase of public education spending in the United States in recent years, so that the statistics reflect a rise in the number of dollars spent on education in *all* states. Where plaintiffs have won their cases, however, there has been about a 14.2% increase in the median funding level. Where they have lost, the increase has been, roughly, only 12%. The real result of these cases, however, is not in their adequacy component but in their equity component. That is shown by the following chart.

Table 1 illustrates the changes in the equity of school funding in Kentucky over time. The Gini coefficient measures the relative dispersion of funding among students. A "1" is perfectly unequal, and means in effect that one unit has captured all the funding; zero reflects perfectly equal funding. If we track the Gini coefficient over time in the states where cases have been won, we can see the extent to which the states now have more equal distribution of resources.

Notice the direction of the line in Table 1. It begins at about 0.100 and then within a few short years (lower right of table) it winds up at .066, which is over a 30% reduction in the level of inequality.

Table 2 shows the changes in the equity of New Jersey's schools in the wake of the 1990 state supreme court decision striking down the existing funding

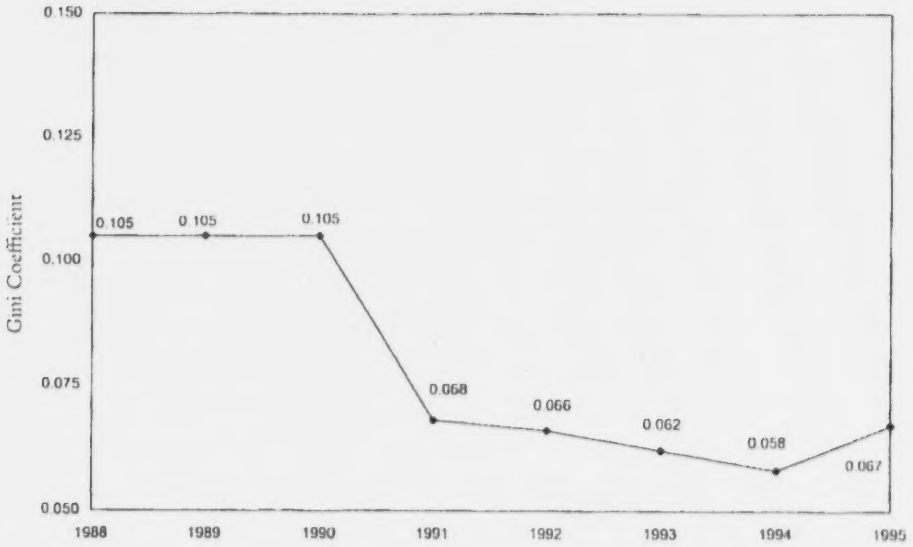

Table 1

K12 districts only.
All values weighted for district enrollment and calculated using constant 1995 dollars
Data source: Kentucky Department of Education, March 1994 and December 1996

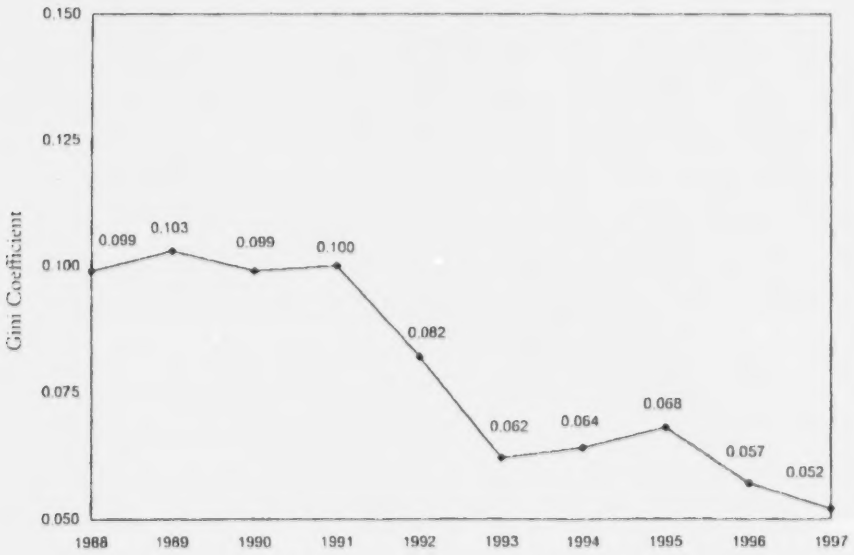

Table 2

K12 and hypothetical K12 districts constructed from regional high schools and K8 and K6 districts.
All values weighted for district enrollment and calculated using 1997 dollars
Data source: New Jersey Department of Education, January 1994 and March 1997

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scheme. Note that the 1990 decision is followed in 1991 by a legislative reform bill, resulting in a sudden and rapid drop-off in the level of inequality.

While it is true that the median level of educational funding seems only modestly affected by court school finance decisions, the equality of the distribution of educational dollars can be substantially altered by courts. This is especially true when courts follow up their initial decisions with further rulings on the constitutionality of legislative funding reforms. The subsequent decisions typically heighten pressure on state legislatures and induce further compliance. While the particulars of the policy stories in Kentucky and New Jersey are vastly different, and they are indeed different in almost every case, there are striking similarities in those states where the plaintiffs have been successful.

Losing has the opposite effect. There has been an increase of nine to ten percent in the average level of inequality in states where the plaintiffs lost. But it is not merely the percentage of change altogether or the percentage of the change in the distribution that is at stake; the difference in absolute level of funding is enormous. Public education is a huge industry in the United States. If we were to take the money that states and localities spend on education and put that figure into the federal government budget, it would constitute the budget's largest item, amounting to roughly 22% of the total. Measured by Gross Domestic Product, the amount spent by states and localities (and, to a modest extent, the federal government) on public elementary and secondary education adds up to about 4.4% of this nation's total economic activity. If there is just a marginal shift of 10–15% in the distribution of that money, then vast sums have been moved around to localities or from localities.

Here the politics get particularly sticky. Moving a lot of money around is hard for state legislators, because school districts overlap and intersect with state legislative electoral districts. When a state department of education produces an estimate of changes in school funding, every state legislator looks at his or her district and asks, "How did I do?" As New Jersey Assembly member John Rocco, chair of the Assembly's education committee, put it, any reform "has to go to the legislators and the first thing a legislator does is to look at his district, to say 'Am I winning or am I losing?'"[12] It takes some significant, highly politicized adjustment of these formulas to generate a winning coalition of legislators behind major funding changes.

Part of the problem in coalition-building is that the beneficiaries usually are clearly identifiable. The goal is to funnel more money to poor districts. In general, there are only two ways to direct additional funds to poor districts, and both are politically difficult for state legislators. The first is to raise taxes, so as to generate new money for the poor districts. The second is to take

money away from other, generally affluent districts and transfer it to districts with minority urban poor populations. Neither of these is a recipe for reelection, and there is intense opposition to taking money from affluent districts and spending it in inner cities or the kind of needy rural areas that exist in states such as Alabama. Whether the poorer districts are urban or rural, they do not contain the suburban soccer moms legislators want to befriend.

Jim Florio lost the New Jersey governorship, and the Democrats in the New Jersey state legislature were swept out, precisely because Florio's plan to change the distribution of money significantly in New Jersey made him politically untenable. This is the kind of conflict that has to be sorted out by state legislators. This is where the color of money becomes apparent and the salience of race to school finance litigation becomes most obvious.

Because the relationship between race and money cannot always be expressed directly, however, it is frequently couched as complaints about inefficiencies and waste in urban school systems. These complaints are often quite justified; there are districts that are doing miserable jobs of educating. But those districts are the vehicles in place and the question is what we ought to do to reform those vehicles. Should we not fund them, as a punishment for past failures, or should we restructure and impose change as a condition for new money? The more frequent, politically easy response is simply to complain about waste and abuse.

In the 1970s, for example, Connecticut was forced to provide additional educational funds to Hartford. "The majority party in [the Senate] today," state senator Richard Bozzuto declaimed, "is about to commit a travesty on every taxpaying citizen in the state of Connecticut...Today, you are legislating a tax that is going to cost every citizen in this state more money and you're funneling it into a cesspool, a political cesspool that spends and spends because they know that they're not responsible."[13]

A former state senator, whom I interviewed some twelve years after Bozzuto made that comment, immediately interpreted it as describing African Americans in Hartford as living in a cesspool. Talk of corruption, of taint, of inefficiency, of all the racial stereotypes that had appeared in previous school desegregation lawsuits emerged again when the talk turned to money. There is always a racial dimension to the class aspect of school finance reform in the United States.

That brings us back to the *New York Times* op-ed referred to earlier. In order for the Alabama school finance lawsuit to move forward, a court had to strike down Amendment 111 to the Alabama Constitution. What was Amendment 111? Enacted in reaction to *Brown v. Board of Education*, Amendment 111 said in effect that public education was not a fundamen-

Talk of corruption, of taint, of inefficiency, of all the racial stereotypes...emerged again when the talk turned to money. There is always a racial dimension to the class aspect of school finance reform in the United States.

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tal right in the state of Alabama. That meant the state could close schools rather than integrate them. Amendment 111 was struck down as unconstitutional, but there have since been efforts by some Alabamans to reinstate it. This, of course, would enable the state to distribute monies unequally or inadequately without violating its constitution.

The connection between the desegregation cases and the school finance cases brings us to a third point – one about moral symbolism. In some respects, there is a moral or normative symmetry between the school finance claims and the school desegregation claims, even though they revolve around different policy issues with different dynamics. Under Jim Crow, segregated schools had crippling effects. There lies the parallel with school financing disparities, because in both cases, the result is a system that damages children.

NOTES

1. Adam Cohen, "After 10 Long Years, Alabama Is Back Where It Started," *New York Times*, March 11, 2002.

2. *On Equal Terms: The Constitutional Politics of Educational Opportunity* (Princeton University Press, 2001).

3. *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973); *Morgan v. Hennigan*, 379 F. Supp. 410 (1974).

4. *Serrano v. Priest*, 5 Cal.3d 584, 487 P.2d 1241 (1971); *Rodriguez v. San Antonio Independent School District*, 337 F.Supp. 280 (1971).

5. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

6. "Today, education is perhaps the most important function of state and local governments...It is the very foundation of good citizenship." *Brown v. Board of Education*, 347 U.S. 483 (1954), at 493.

7. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967). The court's first use of the suspect classification doctrine for race-based government action came in *Korematsu v. United States*, 323 U.S. 214 (1944), at 216, but the doctrine was not fully developed until after *Brown*.

8. Montana's constitution, for example, declares, "Equality of educational opportunity is guaranteed to each person of the state." Art. 10, sec. 256, para. 1. There is a full compendium of state quality clauses in Robert F. Williams, "Equality Guarantees in State Constitutional Law," 63 *Texas Law Review* 1195 (1985).

9. *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973). Art. 8, sec. 4, para. 1 of the New Jersey constitution says, "The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."

10. The significant state supreme court rulings that have either struck down the existing school finance system or upheld it are listed in the Appendix.

11. New York: *Campaign for Fiscal Equity v. New York*, 187 Misc. 2d. 1; 719 N.Y.S. 2d. 475 (2001). Connecticut: *Sheff v. O'Neill*, 238 Conn. 1 (1996).

12. Associated Press, "Sticking points remain in school funding talks," *The Record* (Bergen, New Jersey), October 3, 1996.

13. Quoted in Reed, *On Equal Terms*, p. 165.

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Electoral Politics and School Finance Reform

Jeffrey Henig

From the standpoint of those seeking material goods or social justice, the different levels and branches of government represent distinct decision-making venues. Each has its own rules of thumb for decision-making, its own resources, its own formal rules, and its own alignment of privileged actors. Douglas Reed focused primarily on the judicial arena, with a shift from the federal to the state level and from race to class. My focus here will be the electoral politics involved in school reform, primarily at the local level. It, too, will address some of the related issues of race and class.

To African Americans in the 1950s, the federal courts appeared more promising than local governments as a venue for pursuing their claims. Electoral politics tend to respond to mobilized voter majorities, and at that time blacks in this country were not only in the minority in most jurisdictions but also faced local, racially conservative political regimes that still used both formal rules and informal intimidation to limit black participation. The judicial arena appeared attractive by comparison. It had its own set of obstacles, but at least it held the prospect of decisions that would elevate constitutional principle over political popularity.

Since then, however, both the population and control of the local formal levers of government have shifted from white to black hands in a number of large school districts. Back in the 1950s, some looked forward to this as constituting the best solution for the problems of urban schools. The early assumption was that a predominately white teaching force with low expectations was playing a major role in limiting the achievement of African-American children, so a change in faculty racial composition seemed crucial. Although the racial complexion of the teaching force changed in some cities, the problems remained, and so the new

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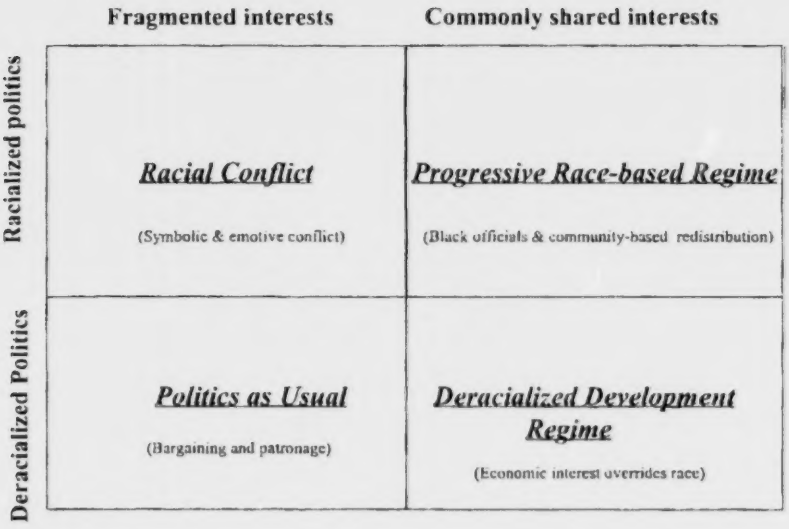
goal became control of the school systems' administrative apparatus. In some increasingly black cities, African Americans then began to be chosen for superintendent and school board positions; often such racial change in administrative control of schools predated the shift in other bureaucracies such as those responsible for police, fire, and economic development. Again, the shift in the race of those in charge did not lead to sharp and clear improvements in educational performance, and again the ante was raised. Many people began to argue that controlling the schools did not matter, absent control over money and power and city councils and mayors' offices.

In *The Color of School Reform*, Richard Hula, Marian Orr, Desiree Pedescleaux and I looked at what we called black-led cities: cities in which the formal control of local government had shifted in large part to African-American hands.[1] We studied Atlanta, Baltimore, Detroit and Washington, grappling with the question of why the shift in racial control had not had the impact that some had envisioned.

Most of the education literature provides little help in addressing this question because it contains a terribly naive view of the situation in cities. It depicts education as an apple pie issue about which everyone agrees, and as an arena in which hard issues and the divisions around race and class that are a part of local politics fade into the background. If this were correct, if everyone agreed that education is important, if that belief put white downtown business leaders and neighborhood community activists and parents and taxpayers all on the same page, then the failure of urban school systems to improve could be attributable to lack of understanding about what to do, or lack of coordination in going about it, or self-interested behavior by bad guys elevating their own interests above those of the common good.

The tradition of emphasizing a common objective interest is deeply embedded in the way Americans historically have thought about schools. The literature's similar de-emphasis on cleavages, particularly of race, is not particularly new or surprising. The old fashioned explanation for it is the discomfort that people have in talking seriously about race. A newer set of theories holds that race simply isn't as important as it used to be, and that the story about what affects politics and social change in the country is really about economics.

If we assume, however, that interests are not necessarily common and aligned and that race may continue to be an important source of political motivation and cleavage, we get a very different set of expectations for the city.



From Henig, Hula, Orr, & Pedescleaux, *The Color of School Reform: Race, Politics, and the Challenge of Urban School Reform*. Princeton University Press, 1999.

The chart above lays out four different scenarios for the kinds of educational change that will occur, depending on whether you assume (as in the lower two quadrants of the chart) that race is becoming unimportant and politics is becoming deracialized, or (as in the upper two quadrants) that race still constitutes an important cleavage. The other dimension is whether you assume (the right two quadrants) that people share interests when it comes to education and agree both on its importance over other priorities and on what must be done, including what must be done for low-income and minority students. Conversely, do you assume that interests are fragmented, that groups approach politics with more parochial concerns and try to carve out the biggest possible piece of the pie for themselves? Those factors generate the four scenarios.

The upper right progressive race-based regime represents the optimistic scenario shared by many within the minority community in the 1950s as they envisioned the possibility of minority control of cities. It was based on the assumption that once African-American leaders attained positions of political power, they and the parents of children in these schools would share a common progressive agenda, and would agree about the importance of investing in education.

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Another optimistic scenario, depicted in the lower right, was about the deracialized development regime. It was based on the notion that race would become increasingly less important and the still predominately white local business leaders and the new black leaders would share a common interest in building up the schools as a tool for economic development and growth.

Race is a powerful force as a perceptual filter. It is a baseline definer of patterns of trust; a reservoir of potent symbols that can be divisive or unifying or both at the same time.

Then there were two less optimistic perceptions. The first was one in which race continued to be a source of symbolic and polarized conflict; the second predicted politics as usual after racial change. That meant that schools would continue to be a source of patronage and that neighborhoods would battle over getting the bigger share of the teachers or the capital budget and the like.

What we discovered was that no single one of these four scenarios accounts for the dynamics of school politics in black-led cities; instead, each captures a piece of the story. Our study was part of a larger study of eleven cities, the other seven of which were not predominately black-led.[2] We found, when we looked at all the cities regardless of racial or ethnic confrontation, that many of the cleavages did not reflect race in a direct or obvious way. On the other hand, we found that race still was - and is - a powerful force as a perceptual filter. It is a baseline definer of patterns of trust; a reservoir of potent symbols that can be divisive or unifying or both at the same time but that have tended to complicate rather than simplify the challenge of school reform.

Most of what we found did not depend upon the racial composition of the cities; in fact, when it came to educational reform, the four black-led cities looked very much like the other seven cities in the larger project. Most of these urban school systems faced tremendous problems. Some of the problems were the result of suburbanization and disinvestment, but roughly half of the cities spent more per pupil on their schools than did the surrounding suburbs.

We concluded that of course the central city schools need and deserve more, but they can and should do more with what they have as well. The problems are those involved with mounting a sustained education reform movement. They do not reflect a lack of effort, a resistance to new ideas, or fundamental cleavages that made it impossible for local black leaders to work with white businesses, foundations or state officials. In all of the cities we studied, there were numerous examples of systemic reform endeavors in which business community and local community leaders came together to elect a reform board, or agreed in other ways. But in all cases, these efforts were sporadic and ephemeral, and had limited measurable long-term gains.

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I would therefore argue that the primary challenge is to build a constituency that can sustain school reform, not simply initiate it.

School reform is much more difficult than a lot of the other things cities do. It is harder to address serious school reform than to build a convention center or a sports stadium or other things that cities do well and that bring white and black constituencies together.

In addition, we found that in many ways the predictions imbedded in the more racialized theories of the upper quadrants did not hold up very well. Let me give you three examples.

First: We anticipated a fair amount of polarization by race in the way people reacted to the idea of the business community taking a lead. We expected that business leaders would talk about the importance of dealing with waste and their own expertise in taking over, and that in the grassroots community-based sectors we would find resistance to the idea of business playing a role that was perceived as being imposed on the community. But that is not what our interviews showed. The language across these different sectors was very similar. Some of the strongest, most fervent arguments we heard in favor of business taking a lead in school reform came from community activists at the grassroots level.

The second example of a racialized vision not holding up: We found much in these cities that could be explained by the politics of jobs and patronage. As Douglas Reed mentioned, schools are big business, especially in central cities where the private sector is often constrained. In Baltimore, Detroit and Washington, the school district is the city's largest employer. As many conservative critics argue, the teachers' unions often play a reactionary role, resisting reform out of fear that it will translate into more work or fewer jobs. This is a dynamic that is familiar to many cities because it resembles what they experienced during the Progressive reform era some seventy years ago, albeit with a different racial and ethnic composition.

Third: The fact that a majority of the teachers and school administrators were now black rather than white did not result in a dramatic new sense of common purpose among school personnel and the predominately black students and parents. There were many indications of a striking class cleavage within the African-American communities. Black teachers exhibited considerable scorn towards the families and parents, while the parents felt that they were looked down upon and not truly welcome in the school communities. (All of these are of course generalizations with many exceptions.)

On the other hand, we found that race altered the way even these relationships played out - not race simply as skin color and prejudice, but race as a shared political history that resulted in racially framed perceptions and

racially grounded loyalties. Ironically, to the extent that it generated a common purpose and capacity to mobilize, race was manifested less in support of broad school reform than in reaction against reform initiatives that were seen as threatening local institutions that had only recently passed into African-American hands. Again, three examples.

Example one: Conservative rhetoric about the failure of school reform suggests that the unions are simply too powerful, and that they block school reform. But in every other sector in this country the unions have been increasingly weak, and in fact weak unions are the norm in education as well. There is low participation in teachers' unions, in part because many of the teachers live in the suburbs. Why, then, are the unions able to block reforms that they find threatening?

Our answer to that is that they were able to count on their ability to mobilize both the parents and the crucial black church community. Those constituencies supported them in opposing what was seen as an attack on a very valued local institution. Historically, schools in these cities have played a major role in community-building and in providing jobs to educated African Americans when jobs weren't available elsewhere. The leadership of the civil rights movement was made up in large part of educators and the churches, and the remnants of that coalition remain.

Example two: White business leaders and black government leaders spoke similarly about schools. When it came to a long-term working relationship, however, the vision of the business community and city hall working together to raise money and support sustained initiatives did not hold up. Commentators have overestimated the white business communities' objective need to invest in the schools. Many individual business leaders are genuinely concerned and willing to devote time and energy to the cause of local school reform, but they are the exception rather than the rule. Most business leaders see their real responsibility as lying elsewhere, and they reckon that if necessary they can meet their employment needs by hiring workers from outside the city system or training their own workers. When the going gets tough in the school reform enterprise, when the rhetoric flies hot and heavy in what is frequently a controversial area, most of the business community pulls back.

In addition, even when local African-American leaders see a reason to pursue a common agenda with the business community, they perceive themselves as threatened by challengers at the grassroots level who will portray them as being controlled by the white business elite.

Third example: Just as blacks are gaining more control of formal local authority, the reins of power are increasingly being pulled back to the state

legislatures where the racial balance is quite different. That may be coincidental, although I doubt it.

We all know that it is difficult to mount and sustain a collective purpose to address social problems. It is especially difficult when formal authority is as fragmented as it is in the American system of federalism, with its emphasis on checks and balances. And it is all the more so in central cities, where the combination of concentrated poverty and the pull of the suburban exit option exacerbates problems while sapping resources.

Courts can be an important tool to leverage change in some of the structural imbalances, when politics alone would not suffice, but ultimately the courts too need a political constituency if their gains are to be realized and sustained. That is the background story to much of Douglas Reed's *On Equal Terms*.[3]

Race is potent in this context because it amplifies some of the structural problems faced by cities, and because it is a powerful perceptual filter. It is both personal and rooted in historical experiences that affect the bonds of trust and loyalty upon which collaborative political endeavors depend.

For these reasons, I think there is likely to be a natural tendency for cities to fall back on less demanding and problematic modes of action. They turn to politics as usual, and focus on more straightforward and technical tasks such as downtown development projects. Or they substitute within-group solidarity based on racial symbolism for a pragmatic pursuit of tangible collective gains. Progressive human capital investment-oriented regimes are the hardest to sustain. A development regime, although still a challenge, is easier. Patronage and racial polarization are the equilibrium states towards which we can expect cities to gravitate.

This will remain true unless we can build a civic capacity that will support extensive and extended commitment even in the face of competing needs, and even when progress is so slow and difficult to document that it is unlikely to show up until after current elected officials are long gone and displaced by others.

NOTES

1. Jeffrey R. Henig, Richard C. Hula, Marion Orr, and Desiree S. Pedescleaux, *The Color of School Reform: Race, Politics, and the Challenge of Urban Education* (Princeton University Press, 1999).

2. The other cities in the study were Boston, Denver, Houston, Los Angeles, Pittsburgh, San Francisco, and St. Louis.

3. Douglas S. Reed, *On Equal Terms: The Constitutional Politics of Educational Opportunity* (Princeton University Press, 2001).

Educational Equity and the President's Initiative on Race

Judith A. Winston

In 1997 President Clinton launched "One America in the Twenty-First Century: The President's Initiative on Race." His major reason for doing so was the opportunity for the United States, living in a time of relative peace, to talk about the ways in which race matters continue to stand in the way of the country's progress in many areas of life. He was also concerned about the real possibility that because of the emerging and increased diversity of race and ethnicity in this country, the U.S. would find itself facing the kind of tribalism that existed in places like Eastern Europe. Demographers had been predicting for some time that by the year 2050 the nation would have no majority race or ethnic group.

The president believed that we needed to do two things to move beyond our racial past. The first was to engage the nation in a "National Conversation on Race," which would study the history of race relations. The second was to begin the process of recommending and promoting policies that would help close the "opportunity gap": the vast disparities that exist across facets of American life such as education, employment, health care, home ownership, and the administration of justice, where race is a marker.

President Clinton described his ultimate goal and interests this way. He said, "Can we be one America respecting, even celebrating, our differences, but embracing even more what we have in common? Can we define what it means to be an American, not just in terms of the hyphen showing our ethnic origins but in terms of our primary allegiance to the values America stands for and values we really live by? Our hearts long to

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answer yes, but our history reminds us that it will be hard. The ideals that bind us together are as old as our nation, but so are the forces that pull us apart. Our founders sought to form a more perfect union; the humility and hope of that phrase is the story of America and it is our mission today."[1]

He appointed a seven person advisory board to lead the effort, and ultimately a small staff of people from within government was brought together to help implement the goals of the Race Initiative. That, in any event, was the plan.

In fact, the effort was fairly fractured from the beginning. The idea of a Race Initiative that, in the one year allotted to it, would tackle the complexity of race relations in the United States, reflected a very high level of naivete.

One of the first discussions was about whether the Race Initiative's sole focus would be the relationships between African Americans and whites. As one might imagine, this idea did not sit well with a number of other racial and ethnic minority groups. Some Latino advocacy groups, for example, were concerned about the very concept of race, because much of the Hispanic community considers its Hispanic heritage to be a form of ethnicity rather than race. The American Indian community was distressed that there was no American Indian representative on the Race Initiative's board, even though the president and his staff said that no group was represented as such - although of course the board included people who identified themselves as belonging to particular racial and ethnic groups.

There was, as we discovered, an extraordinary amount of skepticism and lukewarm support among senior White House advisors. I argued that we needed to start the conversation on race in the White House, but many senior presidential aides believed the Race Initiative to be a lose-lose strategy. Nothing good would come out of talking about race, they believed, particularly because the president had started the initiative when there was no crisis in the country. That, they argued, is the only time Americans are willing to talk about race and solving racial problems: in response to some great conflagration.

In addition, there were policy and turf battles. Quite frequently, when a problem with a racial or ethnic component arose during the fifteen month life of the Race Initiative, the Initiative was given the responsibility for coordinating a response or otherwise handling the problem. My staff and I found ourselves trying to determine where the Department of Race was, so that we could take advantage of its resources! And in spite of their willingness to turn to the Initiative whenever there were concerns with a perceived racial component, the policy staff and the various departments dis-

played a great deal of resistance to us out of fear that we would interfere with the policy directions that they had already established.

Initially, there was no infrastructure to support the Initiative. There was no strategic plan for achieving its objectives. In fact, representatives from the civil rights advocacy community often said that all they expected was lip service because no one knew how to carry the Initiative out and they saw no battle plan on the table. "How do you go about bringing Americans together to talk about race?" they asked. "We don't share a common language in which to do that."

In fact, the speech that the president delivered at the University of California-San Diego to launch the Initiative reportedly was very different from the one he carried onto Air Force One for the trip to California. The one with which he boarded had been reviewed with approval by many of his senior policy staff. The one with which he deplaned had been rewritten in transit with the help of Chris Edley, his advisor on race, and others who felt that the senior staff-approved speech was much too unfocused and timid. The sole objective of the first speech was to have a great conversation about race. By the time President Clinton got off the plane, there was the added goal of actually developing policies and practices to help eliminate the opportunity gap.

This history is especially important in the context of education equities. I admit that in many ways I shared the naivete that characterized the early conceptualization and implementation of the Initiative. Although I was not involved in the initial stages, and was given all of one day to learn about it and two to decide whether I would accept the offer to become its Executive Director, I decided this was too important an opportunity to be on the outside looking in. What I did not realize initially was that the goals we had established, while noble and important, simply could not be achieved in the allotted time frame. In addition, of course, no one anticipated that six months into the Initiative, the president's ability to lead on issues of race and education and morality would be crippled by the Lewinsky scandal. By January 1998, the president was not able to be engaged significantly in this effort.

What did the Race Initiative do to address educational equity and why? Our first step was to take advantage of the comprehensive education reform agenda that the president and the Department of Education had laid out – an agenda that was the subject of a number of policy initiatives. We wanted our efforts to be, and to be seen as being, seamlessly aligned with the president's goals. In 1994, for example, the Elementary and Secondary Education Act had been reauthorized.[2] That, in my view, con-

stituted the education legislation revolution. The Act represented the first time the federal government attempted to develop a legislative scheme that would align education reform efforts in the larger community with the reforms of Title I of the Elementary and Secondary Education Act, which focused on the education of poor children.[3] The legislation made clear that states and school districts would be held accountable for helping their poor children achieve the same high standards that were being developed and implemented for other children. There were to be no second class achievement goals for poor children. Standards had to be developed, and so did assessment instruments that would measure the extent to which poor children enrolled in Title I programs were being taught to meet those standards. That, at least, was the expectation and hope.

The advisory board held a number of public meetings around the country on behalf of the president. Some involved a single board member while others involved the full board. Many were convened to share information with the public at large about the racial disparities that existed and exist in educational achievement, with the additional hope that the information would be picked up and disseminated by the media. We and the president believed that an American public that professed to value education would want to do something about the wide achievement gap among racial and ethnic groups, once the facts were brought to the public's attention in a compelling fashion.

We and the president believed that an American public that professed to value education would want to do something about the wide achievement gap among racial and ethnic groups.

What we failed to realize was that although there are 250,000,000 Americans in this country, too few of them beyond the president and the Race Initiative advisory board and staff were crying out for a conversation about race and racial disparities. It was not an easy task to get anyone to come to the table, and the people who did come were primarily those who were already engaged in the effort of reform and racial reconciliation. (Others were people who, thinking we were akin to the Equal Employment Opportunity Commission, brought their complaints about racial and ethnic discrimination to us for resolution.)

After these public meetings, however, the board made several recommendations to the president for strengthening education policy to benefit poor children and children of color. It identified promising practices around the country that its members thought could be emulated, assuming additional funding. It recommended that the president work hard to develop and fund programs to increase the number of well-prepared teachers going to high poverty and high minority schools. It noted the work of people like Dr. James P. Comer in educating teachers of teachers.[4] It suggested expanding existing pipeline programs such as the GEAR UP Program, which con-

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centrates on interesting young children of color and poor children generally in doing what is necessary to go to college.[5] We also were able to sit in on all the domestic policy staff's meetings about education to help ensure that the racial dimensions of the problem were addressed.

It was fifteen months of great adventure. I and my band of thirty staff members were not only focusing on educational equity issues but on all the other race-related issues, working to help the advisory board and the president solve the problem of race.

The first [challenge] is this country's unwillingness...to confront and understand the extraordinary complexity of race in the United States and the role that race has played in creating today's educational inequities.

There were a number of people around the country who were energized by this effort, and who did in fact do a great deal in their local communities. They worked in coalitions to develop plans for resolving some of the significant educational problems faced by black and Hispanic students in big school systems. Often, however, they found themselves facing the challenges and issues that have been described by Douglas Reed and Jeffrey Henig, in which race was a significant and daunting component. Essentially, the end result of our efforts was the advisory board's 266 page report to the president.[6] It appeared on the same day that Kenneth Starr issued his report to the nation,[7] and so it was as though we had said nothing at all.

Looking back, I have identified four challenges to and paradoxes in the effort of the Race Initiative, and efforts at the federal level in general, to resolve educational inequities characterized by race. The first is this country's unwillingness and/or inability to confront and understand the extraordinary complexity of race in the United States and the role that race has played in creating today's educational inequities. The inequities did not just happen; governments at all levels, federal, state and local, were intimately involved in creating them. They are the result of what the courts have called societal discrimination.

The second problem, as Douglas Reed implied, is the virtual abandonment of effective equal educational opportunity remedies by the judiciary after *Brown II* in 1955.[8] As new cases attacked segregation in the North and West, the Supreme Court began to order increasingly weak remedies for the dismantling of unconstitutional separate but equal systems. Those decisions, from *Brown* to the more recent affirmative action cases, have made it almost impossible for public entities to use race as a factor in remedying racial discrimination.[9] Look, for example, at *Alexander v. Sandoval*, a Court decision that prevents parents and their children from suing public education systems whose policies or practices effectively discriminate on the basis of race.[10] This means there is no longer a private right of action when, e.g., a school district disproportionately assigns black children to special education classes without having an adequate educational justification for doing so.

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The third problem is the very limited leverage the federal government has over public school teaching and learning. The federal government provides only about 9% of all funds spent on public education. Even so, the funds have been used relatively effectively, through legislation such as Title I, to push school districts to do some things that they might not otherwise have done. There is also the lever of civil rights enforcement, but in recent years the enforcement effort has been severely hampered by court decisions and inadequate funding.

The fourth factor, mentioned by Jeffrey Henig, is electoral politics. Every two, four or six years people in state and federal legislative bodies go looking for votes and the constituency that is most likely to keep them in office. They pay very little attention to the issues that we are addressing here. The problem is that the perceived face of poverty in this country is black. While there are vastly more poor white children than poor children of color, black children and other children of color are disproportionately poor as compared to white children. If you begin talking about programs and policies that will create educational opportunities for poor children, legislators tend to see black faces. Legislators ask, who votes? Not those children's parents. Who is in a position to make campaign contributions? Not those children or their parents. That certainly is a major factor in the way we address education.

This is the link between the failure of school desegregation cases and school finance cases. Increases in school budgets depend upon the willingness of state legislators to appropriate and apportion funding, and they are not eager to direct a lot of capital to places where the face of poverty is black. Victories in litigation will not guarantee effectively implemented remedies if those remedies are dependent upon the action and good will of state legislatures.

The result is a country that is creating major problems for itself by ignoring the implications of the demographics of the future. We expect that 25% of the total population in the year 2050 will be Hispanic, for example, but thirty percent of Hispanic youth currently drop out of high school. Think about the possibility that the rate of Hispanic dropouts will continue into mid-century. Can we sustain prosperity in a country where a substantial percentage of our population in 2050 will not have a high school education?

Franklin D. Raines, former head of the Office of Management and Budget and current CEO of Fannie Mae, recently spoke at Howard University about a Washington newspaper's four part series entitled "Black Money." Reading one of the articles, he commented, one would conclude that life for African Americans has never been better and that the quest for

racial equality is complete. The article noted that a majority of Americans believe that black Americans are doing as well as whites when it comes to jobs, income, health care and education, so Mr. Raines had his staff do some calculations based on that assumption. If in fact African Americans were doing as well as white Americans, African Americans would have two million more high school degrees, two million more college degrees, two million more professional and managerial jobs, $200 billion more in income, $760 billion more in home equity value, $200 billion more in the stock market, $120 billion more in retirement funds, and $80 billion more in the bank. These figures add up to about $1 trillion more in wealth.[11] Its absence constitutes the legacy of race and racism in this country.

NOTES

1. "Remarks by the President at the University of California at San Diego Commencement," June 14, 1997, http://usinfo.state.gov/journals/itsv/0897/ijse/clint11.htm.

2. Improving America's Schools Act of 1994, P.L. 103-382.

3. Amendments to the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2701 et seq.).

4. Dr. James P. Comer, the Maurice Falk Professor of Child Psychiatry at the Yale University School of Medicine's Child Study Center, is the author of seven books including *Waiting for a Miracle: Why Schools Can't Solve Our Problems, And How We Can* (E.P. Dutton, 1997) and *Child by Child: The Comer Process for Change* (Teachers College Press, 1999).

5. The mission of GEAR UP is to significantly increase the number of low-income students who are prepared to enter and succeed in postsecondary education, by focusing on cohorts of low income students and creating partnerships among government, colleges and universities, schools, and outside organizations. See http://www.ed.gov/gearup/.

6. President's Initiative on Race Advisory Board, *One America in the 21st Century: Forging a New Future* (Government Printing Office, 1998). Also see *Pathways to One America in the 21st Century: Promising Practices for Racial Reconciliation* (Government Printing Office, 1999).

7. Kenneth W. Starr, Referral to the United States House of Representatives pursuant to Title 28, United States Code, § 595(c), Submitted by The Office of the Independent Counsel, September 9, 1998 (Government Printing Office, 1998). See http://www.access.gpo.gov/congress/icreport/.

8. *Brown v. Board of Education*, 349 U.S. 294 (1955).

9. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

10. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

11. Franklin D. Raines, "Charter Day Address," Howard University, March 8, 2002, http://www.howard.edu/Charterday2002/address.htm.

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Question and Answer

QUESTION: I understand that to get the 9-0 vote in *Brown*, Earl Warren had to lead his court to make various compromises. Had he been willing to risk not getting a 9-0 vote, a more radical statement could have been issued. Did he make the right choice, or would it have been better to have won by 6-3 or even 5-4 and get a firmer, more uncompromising statement in the case?

JAMES PATTERSON: The most important compromise, of course, was to defer the decision as to how *Brown* was to be implemented for a whole year, and then use the unfortunate phrase, "with all deliberate speed." But at the time, just about everybody who looked at that decision felt that unanimity or something very close to it was absolutely necessary given the state of the country. Historians must put themselves back into the context of the moment, and I think that was the context.

ROGER WILKINS: I am a 9-0 man. I hesitate to think what a Frankfurter concurrence would have looked like. I think Warren did the right thing. You have to remember that *Brown II* was written after the Justices had gotten a sense of Dwight Eisenhower's reaction, and I suspect that their timidity was in part a result of that knowledge.

DOUGLAS REED: Unanimity was essential for any measure of success. I also think that in *Brown II* the Court underestimated some of its strengths. In Gerald Rosenberg's defense, we should remember that the Court has very few tools at its disposal. Part of his argument is not that the Court could do nothing but that it lacked the ability to back itself up. I think that without unanimity, the decision would have gone nowhere.

Q: The problem was implementation, particularly, as Professor Wilkins said, because the Eisenhower administration didn't do its job. But didn't it also arise at the state and local level, where many of the school boards were made up of people who did not believe in integration?

JAMES PATTERSON: We've mentioned Buffalo versus Boston, which is an example of the enormous differences in the way local authorities reacted to the decision. Those differences make generalizations difficult. As my book details, there was really nasty opposition to the decision in

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Milford, Delaware, and yet not far away in Baltimore the reception was much less oppositional.

DOUGLAS REED: We've got a different kind of segregation now than we did in the 1960s. Public school segregation then occurred primarily within a district, and all of the controversies over busing were internal district busing issues. With changes in housing patterns, we now have greater segregation across districts while the districts themselves are more homogeneous. That makes integration much more difficult, especially in wake of the Court's decision in Detroit which prevented cross district remedies.[1] It is the problem that Professor Wilkins is facing on the D.C. school board.

Q: In the *Brown* decision, the Supreme Court said that separate but equal is inherently unequal. Some people have said that was in itself a bit racist, implying that even if schools have the same type of facilities and funding, black children could not get an equal education unless they went to school with white children. Given the *de facto* situation in many inner cities, have most people dismissed the idea that there must be integrated schools in order to get quality education for all? If not, where are we with the *Brown* decision and its assumptions?

DOUGLAS REED: The NAACP has agreed to consent decrees in a number of cities across the south. Charlotte is ending its busing program. Other places have backed away from aggressive school desegregation programs. There have been busing orders in only two cities over the last twenty years and both of those are in Mississippi. The integration ideal clearly is dimmed.

Q: You described a roughly 500 batting average in the state courts. What accounts for the difference among them? Is it the provisions of the state constitution, the quality of the arguments, the composition of the courts?

DOUGLAS REED: The difference lies largely in the political ideology of the judges on each state's supreme court. One might argue that some states have a stronger commitment to public education. The state of Washington's constitution proclaims education to be "the paramount duty of the state," which is stronger language than most other constitutions.[2] There are better tools to work with in some places than others. But when you get down to it, the decisive factor is whether there are liberals or conservatives on the court. A lot of state supreme courts are elected, so they reflect the local political culture to a greater degree than the federal courts.

Q: Cambridge, Massachusetts has tried a system of socioeconomic integration. Do you think that's good or bad?

JUDITH WINSTON: That may be about the only alternative left to try, but I don't think it will be any easier to achieve socioeconomic integration than it has been to achieve racial integration.

DOUGLAS REED: It's a fallacy to use class as a proxy for race, because there are more poor whites than there are poor blacks. A system of class-based affirmative action will draw from a pool that is largely white, and will not generate the same kinds of numbers as one that emphasizes racial diversity. It will result in significantly different experiential diversities. There has been some discussion about the ways in which affirmative action programs have benefited primarily middle class and upper middle class African-Americans, while it is less clear that poor blacks have been the beneficiaries. Colleges and law schools that can enroll minority group members with high test scores are not necessarily going to seek out applicants from impoverished backgrounds with lesser attainments. Doing so, however, would result in greater experiential diversity.

Economic integration is easier against the background threat of racial integration. Many politicians and citizens will support economic balance if they suspect that the courts or others will insist on racial integration if they do nothing.

JEFFREY HENIG: There are two kinds of arguments in favor of committing ourselves to achieving integration based on socioeconomic status instead of around race. One is that class is simply the more significant factor; the other, that it's more politically doable than dealing with race. There are lessons from housing policy that support that notion, including Section 8 housing, housing vouchers and local regulatory programs that require private developers to commit to including a certain percentage of units for below-market housing. Those frequently skate under the political radar screen more successfully than racially defined policies. In that sense, the political strategy has a certain compelling aspect to it.

Unfortunately, economic integration is easier against the background threat of racial integration. Many politicians and citizens will support economic balance if they suspect that the courts or others will insist on racial integration if they do nothing. If you take away that threat, you will find most of the same battles fought on the economic front.

DOUGLAS REED: I spoke earlier of higher education. Lacrosse, Wisconsin tried a lower school busing program based on socioeconomics and the superintendent was almost fired.

Q: One of the problems with education reform is that politicians are always thinking about the next election. Another is the socioeconomic background of the children in the schools. Can you address that?

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DOUGLAS REED: Some state departments of education have gone through a process of trying to define what their curricular components should be in order to achieve a particular level of education, recognizing that adequacy isn't measured in dollars but in the richness of the curricular offerings and the things children are required to learn in the classroom.

New Jersey tried that approach in its third or fourth response to the *Abbott v. Burke* litigation.[3] Governor Christine Todd Whitman tried to focus the New Jersey system on a modular curriculum and talked about the price tag only after the state had defined the curricular components of a thorough and efficient education. I think that approach makes some sense. Although money is crucial, more dollars won't change too much unless they buy the right things. In short, *what* a state pays for is significant. Being able to buy a higher level of curricular offering, and the necessary resources and staff to go with that curriculum, makes a difference. The problem, though, is that the budget is decided on first and then one has to work backwards to determine the curricular offering. We can define a desirable set of education inputs and establish what we want everybody to learn, but pricing that out gets entangled with politics. If it becomes too expensive, the curricular offering is going to be cut back.

Socioeconomic background is of course important. The evidence indicates that the best predicator of children's test scores is the socioeconomic background and educational attainment of their parents. But educators have to deal with the fact that they have a limited institutional context in which to address very big and very difficult tasks. Schools have a particular mission, and it is not necessarily to be a welfare agency.

That said, it would nonetheless be possible to identify schools that are succeeding, in spite of the fact that the children in them come from impoverished backgrounds and have parents with low educational attainments and low educational expectations for their kids. That is the kind of thing the Education Trust is attempting to do. If we identify what is working in those schools, it may to be possible to multiply the efforts. Equally, the important factor may be the unique abilities of a principal or a teacher; we don't yet know. But that's where the project might begin.

JEFFREY HENIG: One of the important legacies of the so-called Reagan Revolution is the successful creation of a national sense of lowered expectations about what government can do. There probably is a mobilizable constituency for spending more on educating low-income children if it results in quick and dramatic success. But our experience suggests that even if spending more does a lot of good, the result will not necessarily

show up quickly and dramatically in test scores. Absent that kind of quick demonstrable result, the political constituency is very fragile. Unless new legal standards are created as constitutional rights rather than statutory language, they are likely to erode in the face of higher costs for education.

I admit to vacillating about the question of the broader environment, wondering whether it makes sense to focus on the schools. On the one hand, it seems clear that we are ultimately not going to resolve a lot of these issues until we address broader economic inequalities. On the other hand, the schools constitute the public institution that has the greatest potential for breaking some of the cycles. The schools get children earlier than our other public institutions do, which may be why, historically, we have loaded so many expectations onto them. There is a limit to what we can expect them to do, however. In an environment of lowered expectations, that becomes very corrosive. The confidence of thirty or forty years ago that education will bring about upward mobility no longer exists, so we criticize the schools when they can't show that they've managed in short time periods to undo the damage that is the result of much longer time periods.

JUDITH WINSTON: We come back to Roger Wilkins' statement that we need to provide quality education to children of color. One of the remarkable phenomena meriting examination is that of black children growing up poor, going to public schools, and succeeding. We should also be urging the government to provide more in the way of support to historically black colleges and universities that, along with some courageous predominantly white schools, have turned people who grew up poor, as I did, into a black middle class.

School is the place where we have the best opportunity to create productive citizens in both social and economic terms. And we know how to do it. There's no longer any mystery about it. What we need is sustained commitment to doing it.

NOTES

1. *Milliken v. Bradley*, 418 U.S. 717 (1974). The lower courts had found that a Detroit-only plan could not eliminate segregation in the educational system, that it "would result in an all-black school system immediately surrounded by practically all-white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area," and that "the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan." 484 F.2d 215 (CA6), at 245, 249. Chief

Justice Warren Burger held for a 5–4 majority that "absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any finding that the included districts committed acts which effected segregation within the other districts," such a remedy was unwarranted by the Court's holdings in *Brown* and subsequent decisions. 418 U.W. 717, at 722, 745. Justice Thurgood Marshall wrote in dissent, "The rights at issue in this case are too fundamental to be abridged on grounds as superficial as those relied on by the majority today. We deal here with the right of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future. Our Nation, I fear, will be ill-served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together." 418 U.S. 717, at 771, 783 (Marshall, J., dissenting).

2. Washington State Constitution, Art. 9, sec. 1.
3. *Abbott v. Burke*, 119 N.J. 287 (1990).

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Appendix: State Supreme Courts and School Finance

Below are the significant state supreme court rulings that have either struck down the existing school finance system or upheld it. Many cases have had several state supreme court rulings; the citations listed below are to either the initial or the most important ruling affecting school financing within a state.

State supreme courts ruling in favor of greater equity and/or adequacy, in alphabetical order of state:

Alabama: *Ex Parte James*, 713 So. 2d 869 (1997)
Arizona: *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994)
Arkansas: *Dupree v. Alma School District No. 30* 29, Ark. 340, 651 S.W.2d 90 (1983)
California: *Serrano v. Priest*, 5 Cal.3d 584, 487 P.2d 1241 (1971) (*Serrano I*); *Serrano v. Priest*, 18 Cal.3d 728, 557 P.2d 929 (1976) (*Serrano II*) (*Serrano I* was based on federal grounds held to be invalid under *Rodriguez*. *Serrano II* is based on state constitutional provisions.)
Connecticut: *Horton v. Meskill*, 172 Conn 615, 376 A.2d 359 (1977) (*Horton I*)
Idaho: *Idaho Schools for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 912P.2d 644 (1996)
Kentucky: *Rose v. Council for Better Education*, 790 S.W. 2d 186 (1989)
Massachusetts: *McDuffy v. Secretary of the Executive Office of Education*, 415 Mass. 545, 615 N.E.2d 516 (1993)
Montana: *State ex rel. Woodahl v. Straub*, 161 Mont. 141, 520 P.2d 776 (1974); *Helena Elementary School Dist. No. One v. State*, 769 P.2d 684 (1989) (*State ex. rel Woodahl* found that a modest equalization scheme was constitutional; *Helena* found the existing scheme unconstitutional)
New Hampshire: *Claremont School District v. Governor*, 138 N.H. 183, 635 A.2d 1375 (1993)
New Jersey: *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973) (*Robinson I*); *Abbott v. Burke* 119 N.J. 287, 575 A.2d 359 (1990) (*Abbott II*)

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North Carolina: *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997)
Ohio: *DeRolph v. State*, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997)
Tennessee: *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139 (1993)
Texas: *Edgewood Independent School Dist. v. Kirby*, 33 Tex. Sup. J. 12, 777 S.W.2d 391 (1989) (*Edgewood I*)
Vermont: *Brigham v. State*, 692 A.2d 384 (1997)
Washington: *Seattle School Dist. No. 1 v. State of Washington*, 90 Wash. 2d 476, 585 P.2d 71 (1978)
West Virginia: *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979)
Wyoming: *Washakie County School Dist. No. One v. Herschler*, 606 P.2d 310 (1980); *Campbell v. State*, 907 P.2d 1238 (1995).

State supreme courts ruling against greater equity and/or adequacy, in alphabetical order of state:

Alaska: *Matanuska-Susitna Borough School District v. Alaska*, 931 P.2d 391 (1997)
Arizona: *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973)
Colorado: *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (1982)
Florida: *Coalition for Adequacy and Fairness in School Funding v. Chiles*, 6909 So. 2d 400 (1996)
Georgia: *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1982)
Idaho: *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975)
Illinois: *Blase v. State*, 55 Ill.2d 94, 302 N.E.2d 46 (1973); *Committee for Educ. Rights v. Edgar*, 174 Ill. 2d. 1, 672 N.E. 2d 1178 (1996)
Maine: *School Administrative Dist. No. 1 v. Commissioner, Dept. of Education*, 659 A.2d 854 (1995)
Maryland: *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 458 A.2d 758 (1983)
Michigan: *Milliken v. Green*, 390 Mich. 389; 212 N.W.2d 711 (1973)
Minnesota: *Skeen v. State*, 505 N.W. 2d 299 (1993)
New York: *Bd. of Educ., Levittown Union Free School Dist. v. Nyquist*, 57 N.Y.2d 127, 439 N.E.2d 359 (1982)
North Carolina: *Britt v. North Carolina State Bd. of Educ.*, 86 NC App 282, 357 S.E.2d 432 *aff'd mem* 320 N.C. 790, 361 S.E.2d 71 (1987)
North Dakota: *Bismarck Pub. Sch. Dist. #1 v. State*, 511 N.W. 2d 247 (1994)
Ohio: *Board of Education v. Walter*, 58 Ohio St.2d 368, 390 N.E.2d 813 (1979)

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Oklahoma: *Fair School Finance Council of Oklahoma, Inc. v. State*, 746 P.2d 1135 (1987)

Oregon: *Olsen v. State ex rel Johnson*, 276 Ore. 9, 554 P.2d 139 (1976); *Coalition for Equitable Sch. Funding v. State of Oregon*, 311 Ore. 300, 811 P.2d 116 (1991)

Pennsylvania: *Danson v. Casey*, 484 Pa. 415, 399 A.2d 360 (1979)

Rhode Island: *City of Pawtucket v. Sundlun*, 662 A.2d 40 (1995)

South Carolina: *Richland County v. Campbell*, 294 S.C. 346, 364 S.E.2d 470 (1988)

Virginia: *Scott v. Commonwealth*, 247 Va. 379; 443 S.E.2d 138 (1994)

Washington: *Northshore School Dist. No. 417 v. Kinnear*, 84 Wash. 2d 685, 530 P.2d 178 (1974)

Wisconsin: *Buse v. Smith*, 74 Wis.2d 550, 247 N.W. 2d 141 (1976); *Kukor v. Grover* 148 Wisc.2d 469, 436 N.W.2d 568 (1989)

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